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IN THE

Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR AT&T AND VERIZON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, *amici* AT&T Inc. and Verizon state the following:

On November 18, 2005, SBC Communications Inc. merged with AT&T Corp. That same day, SBC Communications Inc. changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Verizon Communications Inc. is a Delaware corporation with its principal place of business in New York. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Subsidiaries of AT&T Inc. and Verizon Communications Inc. – including local telephone companies (some of which are Bell Operating Companies ("BOCs") as defined in 47 U.S.C. § 153(4)) and interexchange carriers – provide interstate common-carrier services, subject to statutory duties set forth in the Communications Act of 1934 (the "Act"). Those duties include the duty to provide "communication service" on terms that are "just and reasonable." 47 U.S.C. § 201(b). In their capacity as common carriers, those subsidiaries are subject to private actions for damages under Sections 206 and 207 of the Act, which provide not only for "recovery of . . . damages for which [a] common carrier may be liable" but also for payment of "reasonable counsel or attorney's fee." *Id.* §§ 206, 207. *Amici* thus have an interest in ensuring that Section 201(b) – and the private right of action under Sections 206 and 207 available to enforce it – is properly construed to govern the terms of the relationship between carriers and their customers and not other matters.

At the same time, subsidiaries of AT&T and Verizon are also the nation's largest payphone service providers. *Amici* understand first-hand the business importance to payphone service providers of the per-call compensation that is the subject of this litigation. *Amici* have an interest in ensuring that the Court's resolution of this case does not call into question the authority of the Federal Communications Commission ("FCC" or "Commission") under Section 276 of the Act to establish a regulatory mechanism to "ensure" that payphone service providers are "fairly compensated" for the use of their payphones. 47 U.S.C. § 276(b)(1)(A).

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[1] Counsel for *amici* authored this brief, and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for all parties have consented to the filing of this brief, and letters reflecting the parties' consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

A. A long-distance carrier's failure to pay per-call compensation cannot constitute an "unjust or unreasonable" "practice" within the meaning of 47 U.S.C. § 201(b). The Act's language and structure make clear that Section 201(b) regulates a carrier's provision of service to its customers and does not address the relationship with its suppliers. Section 201(a) requires carriers to provide interstate and foreign communication service "upon reasonable request." *Id.* § 201(a). Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service . . . be just and reasonable" and that any "unjust or unreasonable" charge, practice, classification, or regulation shall be "unlawful." *Id.* § 201(b). The most natural reading of this language is that it applies to the terms under which a carrier *provides* service to those that request it, not the terms under which the carrier *acquires* goods or services from its suppliers that may be used in the provision of communication service.

B. No other reading of Section 201(b) is possible when the provision is read in light of the statute as a whole. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002). The statutory quartet of "charges, practices, classifications, and regulations" refers to the terms under which a common carrier provides service, traditionally as set forth in its filed tariffs. Section 203 requires common carriers to file tariffs showing "all *charges*" and "*classifications, practices, and regulations* affecting such charges." 47 U.S.C. § 203(a) (emphases added); *see also id.* § 203(b)(1) (referring to process for making changes "in the *charges, classifications, regulations, or practices*" contained in tariffs) (emphasis added). As this Court has observed, the common-carrier duties imposed under the Act are "premised" on the understanding that carriers' duties would be embodied in their filed tariffs. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230 (1994) ("Much of the rest of the Communications Act subchapter applicable to Common Carriers . . . [is] premised upon the

tariff-filing requirement of § 203."). Indeed, in defining the "charge[s], classification[s], regulation[s], or practice[s]" that might be subject to complaint under Section 208 of the Act, 47 U.S.C. § 208(b)(1) – the administrative analog to Sections 206 and 207 – the FCC itself held that the phrase is limited to the kinds of activities governed by filed tariffs. *See Formal Complaint Order*,[2] 12 FCC Rcd at 22512-14, ¶¶ 34-37.

C. Although a carrier might impose an additional charge on a customer for a call placed from a payphone, the carrier's failure to pay to the payphone provider the compensation required under the Commission's regulations is not a "practice" involving the provision of service to the customer or that otherwise "affects" the manner in which the carrier assesses charges on its customer under the terms of a tariff. It therefore is not the type of "practice" that could be "unjust or unreasonable" within the meaning of Section 201(b).

In addition, the claim that failure to pay per-call compensation under the FCC's regulation violates Section 201(b) would give rise to a jurisdictional mismatch. Section 201(b) deals only with interstate and foreign communications, while Section 276 addresses "intrastate and interstate call[s]." *Compare* 47 U.S.C. § 201(a)-(b) *with id.* § 276(b)(1)(A). The FCC's per-call compensation rules likewise apply to all payphone-originated calls, including not only interstate but also local (*i.e.*, intrastate) calls. *See* 47 C.F.R. § 64.1300(a). Failure to pay compensation for use of a payphone to make a local call is not in any way related to "interstate or foreign" communication within the jurisdictional scope of Section 201(b).

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[2] Report and Order, *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497 (1997) ("*Formal Complaint Order*"), *petition for review dismissed, U.S. West, Inc. v. FCC*, 173 F.3d 865 (10th Cir. 1999) (table).

The FCC's statement in the *Third Payphone Order*[3] that failure to pay per-call compensation violates Section 201(b) is unreasoned and incorrect.

D. The lack of a private right of action under Sections 206 and 207 does not make the FCC's payphone compensation rules unenforceable. The FCC – which is required under Section 276(b)(1)(A) to "ensure" that payphone service providers are "fairly compensated" for calls made from their payphones – has adequate regulatory tools to ensure that its payphone compensation regime is effectively enforced.

ARGUMENT

To place a local call from a payphone, a caller must first deposit coins – usually $.50 – for the use of the payphone. For placement of certain types of calls, including toll-free calls and calls placed using long-distance carriers' access codes, the payphone provider is effectively barred from charging the caller. Instead, pursuant to regulations adopted by the FCC under 47 U.S.C. § 276(b)(1)(A), the common carrier that ultimately delivers the call to the called party's local network – in the absence of some other contractual arrangement – is required to pay the payphone owner a per-call charge. In that arrangement, the payphone owner is not the carrier's customer. On the contrary, the payphone owner is the carrier's supplier, renting its equipment, in effect, so that the carrier can provide service to the carrier's customer. Although Congress authorized the FCC to adopt regulations to ensure that the payphone owner would be compensated for the use of the payphone in that circumstance, it did not authorize the FCC to declare failure to pay such compensation to be a violation of a carrier's duty to provide service on just and reasonable terms.

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[3] Report and Order, *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 19975 (2003) ("*Third Payphone Order*"), *on recon.*, 19 FCC Rcd 21457 (2004).

SECTION 201(b) GOVERNS THE TERMS UNDER WHICH CARRIERS PROVIDE SERVICE TO THEIR CUSTOMERS AND DOES NOT ADDRESS A CARRIER'S FAILURE TO PAY ITS SUPPLIERS

The Ninth Circuit's determination – that the "unjust or unreasonable" "practice[s]" that Section 201(b) prohibits may include a carrier's failure to compensate payphone providers for the use of their payphones – misreads the statute. Section 201(b) addresses the terms and conditions governing the service that a carrier provides. As this Court held, interpreting the analogous term in the Interstate Commerce Act, "[t]he act uses the word 'practice' in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers." *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 257 (1931).[4] A carrier's alleged failure to pay to its suppliers the compensation required by the FCC's regulations does not fall within the scope of the provision.

A. Section 201(a) contains the Act's core common-carrier obligation, requiring "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor." 47 U.S.C. § 201(a). Section 201(b) then requires that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." *Id.* § 201(b). The natural reading of Section 201(b) is that it addresses the terms under which a carrier *provides* common-carrier services that a customer requests, not the terms under which a carrier purchases inputs from its suppliers. Put another way, Section 201(b) defines the duties

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[4] The Communications Act was modeled on the Interstate Commerce Act, and this Court's precedents under the Interstate Commerce Act accordingly inform the Court's construction of the Communications Act as well. *See AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998).

of the carrier toward its common-carriage customers; it does not define the carrier's duties toward third parties – like the payphone providers at issue here – who are suppliers to the carrier and have made no request for its services.

The use of the phrase "in connection with" does not (contrary to the Ninth Circuit's apparent understanding, *see* Pet. App. 16a) support a broader reading. That phrase is syntactically necessary because, while a carrier imposes "charges . . . *for* . . . service," the "practices, classifications, and regulations" it may establish are "*in connection with* . . . service." 47 U.S.C. § 201(b) (emphases added). It does not suggest that Congress intended to extend the duties of common carriers to parties that have not made any request for common-carrier services. In some colloquial sense, a carrier's habitual failure to pay its equipment vendor for the switches that it deploys in its network can be said to be an "unjust or unreasonable" "practice" that is "connected" to service. But it is inconceivable that Congress would have intended, by regulating common carriage, to have extended regulation to commercial relations between common carriers and their suppliers. *See United States v. Pennsylvania R.R.*, 242 U.S. 208, 229 (1916) ("practices" refers to practices involving "the relation of shippers and carriers").

Any broader reading of the term "practices" in Section 201(b) would clash with the principle that a word is "known by the company it keeps . . . . This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). "Practices" is part of a statutory quartet that also includes "charges, . . . classifications, and regulations." 47 U.S.C. § 201(b). Those additional terms cannot be read to refer to anything other than the terms that a carrier establishes for the common-carrier services it provides. A different and more expansive interpretation of those terms would extend the obligations of Section 201 either to

entities other than common carriers or to activities other than common carriage. As the FCC itself has recognized, that result is contrary to the statute, which limits Title II jurisdiction to activities that are "interstate or foreign communication service[s]" provided by a "person or entity . . . as a common carrier." Report and Order, *Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, 1168, ¶ 31 (1986); *see Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 904-05 (5th Cir. 2002).[5] The term "practices" must be similarly restricted; indeed, this Court has applied the *noscitur a sociis* canon before in construing the meaning of "practices" in the Interstate Commerce Act. *Pennsylvania R.R.*, 242 U.S. at 229 ("Following a well-known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates.").[6]

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[5] A provision added by the Telecommunications Act of 1996 ("1996 Act") reinforces the view that Congress intended to limit common-carrier regulation to common-carrier *activities*. Section 3(44) defines a "telecommunications carrier" as "any provider of telecommunications services." 47 U.S.C. § 153(44). But the definition also provides that "[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services," that is, "offering of telecommunications for a fee directly to the public." *Id.* § 153(44), (46).

[6] The Court's interpretation of Section 2(b) of the Act in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), is not to the contrary. In the context of Section 2(b) – which *limits* the FCC's authority over intrastate matters and does not refer solely to the duties of common carriers – the Court found that the term "charges" could refer to depreciation charges "for intrastate ratemaking purposes." *Id.* at 372. The Court's holding there makes sense, reflecting the determination that, to preserve state authority over rates, the statute likewise preserves state authority over matters – such as depreciation – that determine rates under the rate-of-return regulations then existing. *See* Michael K. Kellogg, John Thorne & Peter W. Huber, *Federal Telecommunications Law* § 2.10, at 103 (1992) ("In rate making, which includes both choosing the rate of return to apply to the rate base and determining the size of the rate base through depreciation practices, the separations process carves out separate spheres upon which the FCC and state commissions can operate

B. Even if Section 201, standing alone, leaves any ambiguity, the remainder of the statute eliminates it. The Communications Act of 1934, "like every Act of Congress, should not be read as a series of unrelated and isolated provisions." *Gustafson*, 513 U.S. at 570. Section 201(b) is part of the "Communications Act subchapter applicable to Common Carriers." *MCI*, 512 U.S. at 230. Therefore, in construing "practices" in Section 201(b), the Court should look as well to the use of the same term elsewhere in the Act, particularly in the Common Carrier subchapter. *See Gustafson*, 513 U.S. at 570 ("'identical words used in different parts of the same act are intended to have the same meaning'") (quoting *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)).

The "heart of the common-carrier section of the Communications Act" is Section 203, *MCI*, 512 U.S. at 229, which establishes the requirement that carriers file tariffs to govern the provision of service.[7] Section 203(a) provides that "[e]very common carrier . . . shall . . . file . . . schedules showing all *charges* for itself and its connecting carriers for interstate and foreign wire or radio communication . . . and showing the *classifications, practices, and regulations* affecting such charges." 47 U.S.C. § 203(a) (emphases added). In this context, the meaning of "practices" is clear: it refers to activities of the carrier or the customer in the context of provision of

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independently."). But the charges that are the subject of Sections 201-205 are charges for service, and the same is true of the "practices, classifications, and regulations" referred to in those sections.

[7] Exercising its "forbearance" authority under Section 10 of the Act, 47 U.S.C. § 160, the FCC has detariffed certain common-carrier services. *See* Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730 (1996) ("*Detariffing Order*"). That Congress empowered the agency to forbear from enforcement of certain provisions of the statute does not alter the character of Sections 201 through 205 as a "'symmetrical and coherent regulatory scheme.'" *Ragsdale*, 535 U.S. at 86 (quoting *Gustafson*, 513 U.S. at 569); *see also MCI*, 512 U.S. at 234 (noting that "the Act establishes a rate-regulation, filed-tariff system for common-carrier communications").

service. *See also id.* § 203(c) (requiring carriers to adhere to the "charges" and "classifications, regulations, or practices affecting such charges" contained in their tariffs). That same meaning is carried over to Section 204, which authorizes the FCC to "enter upon a hearing concerning the lawfulness" of "any new or revised *charge, classification, regulation, or practice*" that has been "filed with the Commission." 47 U.S.C. § 204 (emphasis added). Likewise, Section 205 authorizes the Commission to prescribe the terms of tariffs under which a carrier offers service, that is, "the just and reasonable charge . . . or charges" and "what classification, regulation, or practice is or will be just, fair, and reasonable." *Id.* § 205.

It would be inconsistent with the statute to argue that "charge, classification, regulation, or practice" has one meaning in Sections 203-205 and another meaning in Section 201 – for example, because Sections 203-205 deal with tariffs, and Section 201 deals with matters that may be embodied in tariffs as well as matters that cannot. Such a reading would clash with another closely related statutory provision, Section 202, which prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." *Id.* § 202(a). The discrimination prohibited by the Act is discrimination among "similarly situated customers." *Central Office Tel.*, 524 U.S. at 223; *see also Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 199 (2d Cir. 2001) (a claim under Section 202(a) must allege that a "carrier is *offering . . . service* to other customers at a different price *or under different conditions* than those offered to" the plaintiff) (emphases added, internal quotation marks omitted).[8] The sort of

[8] Section 202(a) does not render the non-discrimination obligation of Section 203(c) surplusage: Section 203(c) requires carriers to adhere to their tariffs and prohibits discriminatory deviations from those tariffs (whether or not such a deviation is unjust or unreasonable). Section 202(a) prohibits unjust or unreasonable discrimination – whether or not the discrimination is embodied in a tariff.

discriminatory "practices" identified in Section 202(a) cannot include differential treatment of similarly situated *suppliers* because a carrier does not offer any service to the supplier. What is true for Section 202(a) is likewise true for Section 201(b).

As this Court recognized in *Central Office Telephone*, the Act "requires the filed tariff to show not only 'charges,' but also 'the classifications, practices, and regulations affecting such charges.'" 524 U.S. at 223 (quoting 47 U.S.C. § 203(a)); *see also Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945) (noting that "charges, practices, classifications, and regulations" "must be filed with the Commission in the form it prescribes"). That is, the common-carrier provisions are concerned with regulating the service relationship between common carriers and their customers. To extend those provisions to reach the relationship between carriers and their suppliers would be to ignore the "statute's text and design." *Gonzalez v. Oregon*, 126 S. Ct. 904, 922-23 (2006).[9]

The FCC's own decisions recognize that the statutory grouping "charge, classification, regulation, or practice" refers to matters that have traditionally been governed by tariffs. Section 208 of the Act authorizes the FCC to hear complaints that a common carrier has violated the Act. 47 U.S.C. § 208. Section 208(b)(1) establishes a strict time limit "with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice," providing that such investigations must be concluded "within 5

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[9] Any broader reading of Section 201(b) would also conflict with Section 601(c)(1) of the 1996 Act, which provides that the Act "shall not be construed to modify, impair, or supersede . . . State . . . law unless expressly so provided." 47 U.S.C. § 152 note. Because the relations between carriers and suppliers is generally governed by state laws of general applicability, a reading of Section 2(b) to reach all commercial transactions would give the FCC authority to displace state law with regard to virtually all transactions involving common carriers. That result is untenable, as the court below acknowledged. *See* Pet. App. 16a-19a.

months after the date on which the complaint was filed." *Id.* § 208(b)(1). The FCC has consistently interpreted Section 208(b)(1) "as applicable only to complaints about matters contained in tariffs filed with the Commission." *Formal Complaint Order*, 12 FCC Rcd at 22511-13, ¶¶ 32, 35; *see also Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1105 (D.C. Cir. 2001) (noting that "[t]he categories listed in § 201(b) are coterminous with those cognizable under § 208(b)"). In the wake of detariffing, the FCC has held that the phrase "charge, classification, regulation, or practice" refers to "those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation" – for example, the claim that "a carrier has imposed unjust and unreasonable terms and conditions on the provision of a service." *Formal Complaint Order*, 12 FCC Rcd at 22514, ¶ 37. The interpretation that the FCC has held applies to this language in Section 208(b)(1) applies as well to Section 201(b).

C. Failure to pay the per-call compensation required by the FCC's regulations thus cannot violate Section 201(b). Section 276(b)(1)(A) does not address carriers' obligations to their customers; it does not address carriers' obligations at all. Rather, that provision directs the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). The fair-compensation provision of Section 276 thus has nothing to do with common-carrier obligations.

To be sure, the rules that the FCC has adopted impose a per-call compensation obligation on carriers. *See* 47 C.F.R. § 64.1300(a), (b). But that does not mean that the obligation can be regulated under Section 201(b). The carrier's obligation under the Commission's rules is to *pay* for a service – the use of a payphone – not to *provide* service under any particular terms. Failure to pay payphone compensation affects neither the service that a carrier's customer receives nor the charges that the carrier's customer must pay.

1. The details of the FCC's payphone regulations make that conclusion inescapable. When the FCC adopted the original payphone compensation rules, its preference was to allow the market to govern payment of compensation to payphone providers, an approach it applied to both local coin calls and some long-distance calls. *See First Payphone Order*,[10] 11 FCC Rcd at 20567, 20569-70, ¶¶ 49, 50, 53, 55. The FCC determined, however, that it could not rely entirely on market forces to govern compensation for toll-free and access-code calls (the types of calls at issue here): because Congress had prohibited payphone providers from blocking calls made using access codes (and, effectively, toll-free numbers as well), payphone providers lacked bargaining leverage with respect to such calls. *See id.* at 20567, ¶ 49. The FCC chose, therefore, to adopt a *default* compensation regime for such calls "that will apply only in the absence of a negotiated agreement between the parties." *Id.* at 20577, ¶ 71.[11] Carriers and payphone providers are thus free to contract around the default compensation regime. And, if payphone providers and carriers do enter into such negotiated agreements, they are enforceable under ordinary contract law, not through any statutory right of action.

Furthermore, the FCC made clear that payment of per-call compensation would *not* have any direct effect on the rights and obligations of carriers and their customers with regard to provision of communications service. "[U]nder the carrier-pays system, individual carriers, while obligated to pay a specified per-call rate to [payphone service providers], have the option of recovering a different amount from their customers, *including no amount at all.*" *Id.* at 20584, ¶ 83 (emphasis added). In our experience, carriers' practice following the adoption of per-call compensation regulations was to

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[10] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*").

[11] The FCC has repeatedly revised the per-call rate, but it has always been a default rate, not a mandated rate.

impose a surcharge on their customers for calls placed from payphones *without regard* to whether the carrier actually rendered payment to the payphone provider.[12]

One might argue that it is unjust and unreasonable for a carrier to impose a payphone surcharge if the carrier fails to pay required charges for the use of the payphone. But, granting the point for the sake of argument, it is the *charge imposed on the customer* that would be unlawful under Section 201(b), not the failure to pay the payphone provider. If a carrier imposes *no* surcharge on its customer, as it may choose to do under the FCC's rules, *see supra*, there is no plausible argument that failure to pay the payphone provider could render the terms of service unjust and unreasonable. The argument thus reinforces the point that Section 201(b) governs the terms under which service is rendered to the customer, not the relationship between the carrier and its suppliers.[13]

2. An interpretation under which a failure to pay per-call compensation constitutes an unjust and unreasonable practice under Section 201(b) fails for the independent reason that there is a jurisdictional mismatch between the coverage of Section 276(b)(1)(A) and the coverage of Section 201(b).

By its plain terms, Section 201(b) applies only to "interstate or foreign communication." 47 U.S.C. § 201(a); *see id.* § 201(b) (referring to "charges, practices, classifications, and regulations for and in connection with such communication service"). By contrast, Section 276(b)(1)(A) explicitly addresses both "intrastate and interstate" matters by requiring the FCC to adopt regulations to ensure compensation for *all*

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[12] *See, e.g.*, MCI Telecommunications Corp., Tariff F.C.C. No. 1, § C.3.02120 ("Payphone Use Surcharge") (filed Oct. 30, 1996).

[13] An additional analogy further illustrates the point. Under rate-of-return regulation, if a carrier incurred costs imprudently, some of those costs could be disallowed in the setting of rates. But regulators would not, as a result, void any existing contracts between the carrier and the supplier. The carrier would pay according to its contractual obligations, but customers would still be required to pay only the just and reasonable tariffed rate established by the regulator.

calls from payphones. *Id.* § 276(b)(1)(A); *see Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561-63 (D.C. Cir. 1997) (per curiam), *clarified on reh'g on other grounds*, 123 F.3d 693 (D.C. Cir. 1997). The FCC has done so by requiring carriers – including local exchange carriers and intra-LATA (*i.e.*, intrastate) toll carriers – to pay compensation for all calls – including intrastate calls – for which payphone providers are not otherwise compensated. *See* 47 C.F.R. § 64.1300. A local exchange carrier's failure to pay compensation associated with an intrastate call from a payphone – which unquestionably implicates the FCC's payphone regulations – is not even arguably related to any interstate communication service. For this reason alone, Congress would have understood that Section 201(b) – which addresses only those practices that are "in connection with" *interstate* communication services – would not be available to address the subject matter of Section 276(b)(1)(A), which by design is directed at both intrastate and interstate calls.

This is not to say that the FCC is somehow limited in its ability to enforce Section 276, or that Section 2(b) places any restriction on the FCC's ability to adopt rules implementing that section. *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999). The point is that Section 276 cannot be read to expand the scope of Section 201(b) to reach matters that have no relation to interstate communications; yet that is the effect of the Ninth Circuit's decision.

3. The FCC's statement in the *Third Payphone Order* that "[a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of section 201(b) of the Act," 18 FCC Rcd at 19990, ¶ 32, cannot support the decision below.

First, the FCC's statement – which is unreasoned and unnecessary for the resolution of the matter before the agency in that proceeding – is not entitled to deference. The rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) – that an agency's interpretation of an ambiguous statute is entitled to deference – does not alter

the bedrock principle of administrative law that a regulation cannot stand if it is "arbitrary, capricious, or manifestly contrary to the statute." *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (internal quotation marks omitted). A purported agency interpretation that is unsupported by reasons – that is, an interpretation that "reflects no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, [and] no application of expertise" – is not entitled to deference. *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997); *see also Public Citizen, Inc. v. United States Dep't of Health & Human Servs.*, 332 F.3d 654, 661 (D.C. Cir. 2003) (where agency statement contained "no reasoning that we can evaluate for its reasonableness, the high level of deference contemplated in *Chevron*'s second step is simply inapplicable"). This Court alluded to this very principle just a week ago. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, No. 04-1527, slip op. at 6 (U.S. May 15, 2006) ("[B]ecause neither the EPA nor FERC has formally settled the definition, or even set out agency reasoning, these expressions of agency understanding do not command deference from this Court.").

Second, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI*, 512 U.S. at 229. For the reasons set forth above, the FCC's purported interpretation of Section 201(b) conflicts with the clear meaning of the statute.

D. Although Section 201(b) does not provide payphone providers a private right of action to sue a carrier for violation of the FCC's payphone compensation regulations, that does not make those rules unenforceable. On the contrary, no party disputes that the FCC has broad *regulatory* authority to enforce the rules it has adopted under Section 276.

First, Section 503 of the Act allows the FCC to impose civil forfeitures (and Section 502 creates criminal sanctions) for willful violation of the Commission's regulations. *See* 47 U.S.C. §§ 502, 503.

Second, a payphone provider may invoke the FCC's adjudicatory authority to seek a ruling that a particular carrier owes it per-call compensation. *See* 47 C.F.R. § 1.2 (noting that the FCC may "on motion or on its own motion issue a declaratory ruling terminating a controversy"). If the Commission issues an adjudicatory order for the payment of money, that order is enforceable by private parties in court. *See* 47 U.S.C. § 407.

Third, Section 276(b)(1)(A) directs the Commission "to prescribe regulations that . . . establish a per call compensation *plan* to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." *Id.* § 276(b)(1)(A) (emphasis added). That provision provides the FCC with ample authority to establish any required procedures and issue such adjudicatory orders as are necessary to the enforcement of its regulations. *See also id.* § 154(i) (noting that the Commission may "issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions"). If the FCC deems its existing procedures (or non-statutory court remedies, such as collection actions) inadequate, it has the authority under Section 276 to establish new procedures that will better effectuate congressional intent.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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